

**PROPOSED AMENDMENTS TO THE
CALIFORNIA CODE OF REGULATIONS
TITLE 23, WATERS
DIVISION 3, STATE WATER RESOURCES CONTROL BOARD
CHAPTER 18, PETROLEUM UNDERGROUND STORAGE TANK
CLEANUP FUND REGULATIONS**

INITIAL STATEMENT OF REASONS

JUNE 2003

**STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD
DIVISION OF FINANCIAL ASSISTANCE**

CHAPTER 18. PETROLEUM UNDERGROUND STORAGE TANK CLEANUP FUND REGULATIONS

TECHNICAL, THEORETICAL, AND EMPIRICAL STUDY, REPORT, OR SIMILAR DOCUMENT RELIED ON

The State Water Resources Control Board (SWRCB) did not rely on any technical, theoretical, or empirical study, report, or similar document in proposing these regulatory amendments.

REASONABLE ALTERNATIVES TO THE PROPOSED REGULATIONS

No reasonable alternatives to the proposed regulatory amendments were presented to or identified by the SWRCB.

REASONABLE ALTERNATIVES TO THE PROPOSED REGULATIONS THAT WOULD LESSEN ANY ADVERSE IMPACT ON SMALL BUSINESS

No reasonable alternatives to the proposed regulatory amendments were presented to or identified by the SWRCB that would lessen any adverse impact on small businesses.

EVIDENCE SUPPORTING INITIAL DETERMINATION OF NO SIGNIFICANT ADVERSE ECONOMIC IMPACT ON ANY BUSINESS

The SWRCB made an initial determination that the proposed regulatory amendments will not have a significant adverse economic impact on any business because the amendments do not impose any new costs on business.

EFFORTS TO AVOID UNNECESSARY DUPLICATION OF OR CONFLICTS WITH FEDERAL REGULATIONS

Based on a careful review of the federal UST regulations contained in title 40, part 280 of the Code of Federal Regulations, the SWRCB has determined that none of the proposed regulatory amendments unnecessarily duplicate or conflict with these federal regulations.

CHAPTER 18 (GENERALLY)

Use of the term “claim” throughout Chapter 18:

Specific Purpose and Necessity of the Proposed Regulation

Assembly Bill 1465 amended the definition of “claim” in Health and Safety Code section 25299.13 to make clear that it refers to more than just a written reimbursement request. The revised statutory definition states that a claim is a submittal of documents to the Fund for reimbursement of eligible costs. These documents include the Fund application, reimbursement requests, and verification documents. The word “claim” is replaced with more accurate terminology in several parts of chapter 18 to ensure consistency with the revised statutory definition. Because the reasons for the replacement of the word “claim” with more accurate terminology are self-explanatory, they are not specifically discussed below.

Article 2. Definition of Terms

Section 2804. Definitions

Specific Purpose and Necessity of the Proposed Regulation

1. **“Claim”:** As explained above, the statutory definition of “claim” was amended pursuant to Assembly Bill 1465. Consequently, it is necessary to amend the regulatory definition of “claim” to reflect the amended statutory definition.
2. **“Residence”:** The proposed amendments revise the definition of “residence” because the existing definition is not consistent with the intent of the Legislature, as reflected in the statute itself and the legislative history of the residential tank provisions contained in subdivision (e) of section 25299.54. The legislative history of subdivision (e) at the time of its adoption stated that the proposed statute would apply to “homeowners” and owners of tanks located on residential property, property zoned only for residential use, or property that has not been used for agricultural purposes for a specified time period where the tank is located at the owner’s residence. This legislative history made clear the Legislature’s intent to apply the residential tank provisions to tanks located at homes or similar dwelling structures. A later amendment of subdivision (e) of section 25299.54, effective September 30, 1992, continued to express this legislative intent that a residential tank must be located on “residential” property, but replaced the requirement that the “property be zoned only for residential use” with the requirement that the “property be used exclusively for residential purposes.” Thus, based on this legislative history and subsequent amendment, there is no legislative authority to support the existing restrictive definition of the term “residence” to only owner-occupied single-family dwellings or duplexes. Nor is there support for a more expansive definition than currently proposed that would include buildings such as hotels or hospitals.

3. **“Residential tank”**: The proposed amendments revise the definition of “residential tank” to more clearly reflect the statutory residential tank provisions set forth in Health and Safety Code section 25299.54, subdivision (e).

4. **“Underground storage tank”**: This definition has been rewritten to reflect Assembly Bill 1465’s amendment of the definition of “underground storage tank” set forth in Health and Safety Code, chapter 6.75, section 25299.24.

Article 4. The Fund

Section 2810 describes the types of reimbursement requests permitted. The first sentence of subdivision (b) was deleted because it is inappropriate in light of the recent revision to the statutory definition of “claim.”

Section 2811 prescribes permitting and other Fund eligibility requirements. The proposed amendments make clarifying changes to the text to ensure consistency with governing law, the permit requirements of chapter 6.7, and the chapter 6.75 amendments pertaining to the amended definition of “claim” and the requirement that storage fees be paid prior to submitting an application to the Fund. The proposed amendments clarify that permit waivers may only be considered for claims where, in addition to other threshold criteria, the claimant owned or operated the petroleum UST or residential tank before January 1, 1990.

Section 2811.2 prescribes Fund application requirements for claimants seeking reimbursement of corrective action costs incurred in response to an unauthorized release from a petroleum UST. The proposed addition of new subdivisions (l) and (m) impose on claimants two new requirements. For subdivision (l) the claimant must provide to the Fund a copy of any agreement the claimant has entered into where a person agrees to incur costs on behalf of the claimant or where the claimant assigns Fund reimbursement rights. For subdivision (m) the claimant must provide documentation that confirms the date any such agreement was entered into. Subdivision (m) also gives an example of the type of documentation that the Fund would consider as being sufficient confirmation of the agreement’s date. A copy of the agreement and documentation to confirm the date of the agreement are necessary to help ensure that the Fund eligibility requirements are not circumvented and that Fund monies are properly distributed.

Subdivision (g)(1) is also being amended to reflect the proposed amendment of the regulatory definition of “residence.”

Section 2811.3 prescribes Fund application requirements for claimants seeking reimbursement of third party compensation costs. The proposed amendment of subdivision (a) incorporates by reference the proposed new requirements set forth in section 2811.2, subdivisions (l) and (m). The reasons for the need to add new

subdivisions (l) and (m) to section 2811.2 apply to the amendment of subdivision (a) of section 2811.3 as well.

Section 2812 prescribes general procedures for reimbursement of claims submitted to the Fund. Clarifying language is provided in subdivisions (d)(8) and (g) to make these provisions more understandable.

Section 2812.1 specifies that a claimant must comply with applicable laws when procuring consultant and contractor services and specifies the bid and other procedural requirements a claimant must follow for obtaining these services. To be consistent with the recently revised statutory definition of a “claim,” subdivision (d) was amended to replace the phrase “initially file a claim” with “file a Fund application.”

Section 2812.2 describes the categories of costs that are eligible for reimbursement from the Fund and lists those costs that are ineligible. One of the ineligible costs listed is the cost of testing for non-hydrocarbon contamination, specified in subdivision (e)(7). This subdivision was rewritten for clarity.

Section 2812.3 contains the double payment prohibition that prohibits a claimant from receiving reimbursement from the Fund for specified costs that have been or will be reimbursed from another source. The double payment prohibition requires a claimant, who receives reimbursement from another source, to demonstrate through documentation submitted to the Fund that the monies reimbursed are not for Fund eligible costs. The proposed regulatory amendments give an example of the type of documentation required and provide the Division of Financial Assistance with the discretion to request any other type of information or supporting documentation it reasonably deems necessary to determine whether a potential double payment has occurred.

The proposed amendments also revise subdivision (d), which addresses the potential double payment issue pertaining to corrective action, regulatory technical assistance, or third party compensation costs that are advanced to a claimant or are incurred on behalf of a claimant and for which the claimant later receives reimbursement from the Fund. The existing regulation specifies that such costs advanced shall not be considered a double payment if a written contract, other than an insurance contract, exists that specifies that the costs advanced must be paid over to the person who advanced the costs. The proposed amendments reorganize this sentence into an itemized list for clarification purposes, and also address an error in the existing regulation that inadvertently omitted how the Division would treat costs incurred on behalf of a claimant pursuant to a written contract.

Finally, the proposed amendments revise subdivision (f), which specifies how the Fund may reimburse a claimant its fair share of costs incurred in obtaining a settlement or judgment for costs the Fund would otherwise have reimbursed. A computation for determining this fair share of costs due the claimant is described. The proposed regulatory amendment clarifies how the fair share is to be calculated by amending the description of the calculation and expressing that calculation mathematically.

Section 2813.3 describes the grounds for removing a claim from the Fund’s priority list and the procedural requirements for removal, rejection, and suspension of claims. This section also describes the claimant’s rights to correct or contest the alleged deficiency that formed the basis for the intended removal. The proposed amendment of subdivision (e) changes the phrase “claimant’s eligibility” to “claim’s eligibility” because the Fund is statutorily authorized only to consider “claims” submitted when evaluating whether they are eligible for placement on or removal from the Fund priority list.

Article 5. Request for Review, Appeal, and Petition Process

Section 2814.2 prescribes the substantive and procedural requirements for a claimant to petition the SWRCB to review a Final Division Decision with respect to that portion of a reimbursement request submitted that was denied. The existing regulation requires a claimant to state in the petition the date on which the Final Division Decision was received by the claimant. The November 27, 2000, regulatory amendments to the Fund regulations changed the date reference upon which a petition to the SWRCB would be considered timely filed—from thirty days from the date of receipt of the Final Division Decision to thirty days from the date of the Final Division Decision itself. As a result of these amendments, the existing regulation’s requirement to identify the date of receipt is no longer applicable. Hence, the proposed amendment to section 2814.2 deletes this requirement.